Minister of Finance & Ors v Natsteel Holdings Pte Ltd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-623–10 OF 2021
RAVINTHRAN, SEE MEE CHUN AND WAN AHMAD FARID JJCA
3 DECEMBER 2024

Civil Procedure — Judicial review — Certiorari — Singapore-based steel bar exporter obtained certiorari order via judicial review to quash Malaysian Finance Minister's decision to impose anti-dumping duties on its exports — Whether company's allegation that it was not given details of method of calculation of duties was not legitimate ground to apply for judicial review — Whether such disclosure was not mandatory under law — Whether company was in any event sufficiently told of methodology of computation and was given opportunity to be heard before duties were imposed — Whether High Court erred in considering issues not pleaded by company in its statement under O 53 r 3(2) of Rules of Court 2012

The respondent, a Singapore-based company, produced and exported steel concrete reinforcing bars ('REBAR') to Malaysia for its construction industry. In response to a petition filed by the Malaysia Steel Association ('MSA') in March 2019 under the Countervailing and Anti-Dumping Duties Act 1993 ('Act 504'), the Malaysian International Trade and Industry Ministry commenced an anti-dumping investigation with regard to REBAR products originating or exported from Singapore and the Republic of Turkey. At the conclusion of the investigation, the first and third appellants decided to impose anti-dumping duties at the rate of 4.97% on REBAR products originating from or exported by the respondent from 22 January 2020–21 January 2025 ('the impugned decisions'). In allowing the respondent's judicial review application to quash the impugned decisions, the High Court held that: (a) the appellants failure to provide the respondent with the details, breakdown and computation of how the normal value and dumping margin were calculated breached the principles of natural justice, procedural fairness and legitimate expectation; (b) the investigation authority's construction of normal value was incorrect and unjustified because it had accounted for an unrealistically high profit margin of 4.75% when the gross profit margins of commodity steel products such as REBAR were only between 3% and 4%; and (c) the investigation authority ('IA') wrongly found that the REBAR imports had injured the domestic construction industry due to price suppression. The instant appeal was against the High Court's decision.

Held, allowing the appeal and setting aside the High Court's decision:

(1) There was no force of law in the contention that the investigation authority ('IA') departed from its so-called long-established practice of disclosing the details, breakdown and computation of how normal value and the dumping margin were determined. Nothing in the WTO Anti-Dumping Agreement made such disclosure mandatory. There was therefore no breach of the respondent's legitimate expectation — which was an issue not pleaded in the statement made under O 53 r 3(2) of the Rules of Court 2012. In any event, such failure of disclosure was not a legitimate ground for judicial review (see paras 24, 41 & 36).

(2) The IA had sufficiently explained the methodology used in determining normal value. The data selected for determining the percentage of sales below the cost of the like product in the domestic market throughout the period of investigation was also sufficiently disclosed; and, before the final determination was made, the respondent was given an opportunity to be heard. There was, therefore, no breach of the principles of natural justice (see para 41).

(3) The IA's construction of normal value was correct and justifiable because it had applied the profit margin as supplied by the respondent itself, which was 4% (see para 41).

(4) The High Court erred in considering the issue that the imports had caused injury to the domestic industry due to price suppression as that issue was not pleaded in the Statement made under O 53 r 3(2) of the Rules of Court 2012 (see para 41).

[Bahasa Malaysia summary

Responden, sebuah syarikat yang berpangkalan di Singapura, telah mengeluarkan dan mengeksport besi tetulang konkrit ('steel concrete reinforcing bars') ('REBAR') ke Malaysia bagi kegunaan industri pembinaan. Susulan suatu petisyen yang difailkan oleh Persatuan Keluli Malaysia ('Malaysia Steel Association') ('MSA') pada Mac 2019 di bawah Akta Duti Timbal Balas dan Anti-Lambakan 1993 ('Akta 504'), Kementerian Perdagangan Antarabangsa dan Industri Malaysia telah memulakan suatu siasatan anti-lambakan mengenai produk REBAR yang berasal dari atau dieksport dari Singapura dan Republik Turkiye. Pada akhir siasatan tersebut, perayu pertama dan ketiga telah memutuskan untuk mengenakan duti anti-lambakan pada kadar 4.97% ke atas produk REBAR yang berasal daripada atau dieksport oleh responden bagi tempoh dari 22 Januari 2020–21 Januari 2025 ('keputusan-keputusan yang dicabar'). Dalam membenarkan permohonan semakan kehakiman responden untuk mengenepikan keputusan-keputusan yang dicabar itu, Mahkamah Tinggi memutuskan bahawa: (a) kegagalan para perayu untuk membekalkan kepada responden butiran, pecahan dan pengiraan mengenai cara nilai normal dan margin lambakan ditentukan telah melanggar prinsip keadilan asasi, keadilan prosedur

dan jangkaan sah; (b) tafsiran pihak berkuasa penyiasatan terhadap nilai normal adalah tidak betul dan tidak wajar kerana telah mengambil kira margin keuntungan yang tidak realistik sebanyak 4.75%, sedangkan margin keuntungan kasar bagi produk keluli komoditi seperti REBAR hanyalah antara 3% hingga 4%; dan (c) pihak berkuasa penyiasatan ('PBP') telah tersilap apabila mendapati bahawa import REBAR telah menyebabkan kecederaan kepada industri pembinaan domestik akibat penindasan harga ('price suppression'). Rayuan ini adalah terhadap keputusan Mahkamah Tinggi tersebut.

Diputuskan, membenarkan rayuan dan mengenepikan keputusan Mahkamah Tinggi:

(1) Tiada kekuatan undang-undang dalam hujahan bahawa pihak berkuasa penyiasatan ('PBP') telah menyimpang daripada amalan yang kononnya telah lama ditetapkan untuk mendedahkan butiran, pecahan dan pengiraan mengenai cara nilai normal dan margin lambakan ditentukan. Tiada peruntukan dalam Perjanjian Anti-Lambakan WTO yang mewajibkan pendedahan sedemikian. Oleh itu, tidak wujud sebarang pelanggaran terhadap jangkaan sah responden yang mana isu tersebut pula tidak diplidkan dalam Pernyataan yang difailkan di bawah A 53 k 3(2) Kaedah-Kaedah Mahkamah 2012. Dalam apa jua keadaan, kegagalan pendedahan sedemikian bukanlah suatu asas yang sah bagi semakan kehakiman (lihat perenggan 24, 41 & 36).

(2) Pihak berkuasa penyiasatan ('PBP') telah memberikan penjelasan yang mencukupi mengenai metodologi yang digunakan dalam menentukan nilai normal. Data yang dipilih bagi menentukan peratusan jualan di bawah kos produk jenis itu di pasaran domestik sepanjang tempoh penyiasatan juga telah didedahkan dengan secukupnya dan sebelum penentuan muktamad dibuat, responden telah diberikan peluang untuk didengar. Oleh itu, tidak berlaku sebarang pelanggaran terhadap prinsip keadilan asasi (lihat perenggan 41).

(3) Tafsiran PBP terhadap nilai normal adalah betul dan wajar kerana mereka telah menggunakan margin keuntungan sebagaimana yang diberikan oleh responden sendiri, iaitu sebanyak 4% (lihat perenggan 41).

(4) Mahkamah Tinggi telah terkhilaf apabila mempertimbangkan isu bahawa import telah menyebabkan kerugian kepada industri domestik akibat penindasan harga memandangkan isu tersebut tidak diplidkan dalam Pernyataan yang difailkan di bawah A 53 k 3(2) Kaedah-Kaedah Mahkamah 2012 (lihat perenggan 41).]

Cases referred to

Lembaga Tatatertib Kumpulan Sokongan (No 1) Jabatan Perlindungan Hidupan Liar dan Taman Negara & Ors v Mariani bt Ramli [2021] 5 MLJ 857, CA (refd)

Zakiah bte Ishak v Majlis Daerah Hulu Selangor Darul Ehsan [2005] 6 MLJ 517, CA (refd)

Legislation referred to

Countervailing and Anti-Dumping Duties Act 1993 ss 4, 16(2), 20, 23, 24(2), 25(2), (2A), (4), (5), 30(3), (4)
Countervailing and Anti-Dumping Regulations 1994 reg 26
Customs (Anti-Dumping Duties) Order 2020
Customs Act 1967 s 11(1)
Rules of Court 2012 O 53 r 3(1), 3(2)

Appeal from: *Natsteel Holdings Pte Ltd v Menteri Kewangan & Ors* [2023] 11 MLJ 345 (High Court, Kuala Lumpur)

Kogilambigai Muthusamy (Federal Counsel, Attorney General's Chamber) for the appellants.
Ho Pui Yan (with Manshan Singh) (Skrine) for the respondent.

Wan Ahmad Farid JCA:

FACTUAL BACKGROUND

[1] This is an appeal against the decision of the learned High Court judge in allowing Natsteel Holdings Pte Ltd's ('Natsteel') application for judicial review to quash the imposition of anti-dumping duties at the rate of 4.97% on REBAR originating or exported by the respondent from the Republic of Singapore from 22 January 2020–21 January 2025.

[2] The parties will be referred to as they are in the instant appeal.

[3] The respondent is a company incorporated under the laws of the Republic of Singapore that produces and supplied steel products and services to the construction industry and is the producer and exporter of steel concrete reinforcing bars to Malaysia.

[4] The first appellant is the Minister of Finance, of the second appellant, who imposed anti-dumping duties at the rate of 4.97% on REBAR products originating or exported from Natsteel of the Republic of Singapore from 22 January 2020–21 January 2025.

[5] The third appellant is the Minister of International Trade and Industry of the fourth appellant.

[6] The fifth appellant is the Director General of the sixth appellant.

[7] The sixth appellant is the Royal Malaysian Customs Malaysia who is tasked to collect the anti-dumping duties imposed on imports of REBAR products originating or exported from Natsteel from 22 January 2020–21 January 2025, on behalf of the seventh appellant.

[8] The seventh appellant is the Government of Malaysia.

CHRONOLOGY OF EVENTS

[9] On 29 March 2019, the Malaysia Steel Association ('MSA') submitted a petition pursuant to ss 4 and 20 of the Countervailing and Anti-Dumping Duties Act 1993 ('Act 504') requesting initiation of an anti-dumping investigation on steel concrete reinforcing bar products that are hot rolled steel bars containing indentations, ribs, grooves or other deformation ('REBAR') originated or exported from the Republic of Singapore and the Republic of Turkey.

[10] Pursuant thereto, on 26 April 2019, the third appellant initiated the REBAR anti-dumping duties ('AD') investigation by issuing and publishing a notice of initiation in the Government *Gazette* No PU(B) 211/2019.

[11] The third appellant then delegated his investigative power to the trade practices section of the fourth appellant (investigation authority ('IA')).

[12] Natsteel then provided its response to the foreign producer's and exporter's questionnaire.

[13] A report containing the IA's finding relating to the preliminary determination ('preliminary determination report') on the alleged dumping of the steel concrete reinforcing bar from Singapore and Turkey was submitted to the third appellant pursuant to s 30(3) of Act 504.

[14] Thereafter, the Government made an affirmative preliminary determination of dumping and injury resulting in the continuance of the investigation and a notice of affirmative preliminary determination of an anti-dumping duty investigation pursuant to s 23 of Act 504.

[15] The affirmative preliminary determination also resulted in the

imposition of provisional anti-dumping duties towards the respondent as a provisional measure pursuant to s 24(2) of Act 504 which was carried out by the first appellant.

[16] The respondent submitted its comments to the preliminary determination report and verification visit was carried out by the IA at the foreign producer's premises.

[17] The IA submitted the essential facts under consideration that form the basis for the final determination whether to apply definitive measures and gave all interested parties including the respondent time to defend its interest pursuant to ss 25(2) and (2A) of Act 504.

[18] The respondent by way of letter dated 23 December 2019 sought explanation from the IA with respect to the numerical breakdown and explanation in arriving at the dumping margin and gave its comments to the notice of essential facts report on 27 December 2019.

[19] A finding was made by the IA and submitted to the third appellant pursuant to s 30(3) of Act 504 who shall give his recommendation to the first appellant pursuant to s 30(4) of Act 504.

[20] The Government made an affirmative final determination pursuant to s 25(4) of Act 504. Pursuant to s 25(5) of Act 504 read together with s 11(1) of the Customs Act 1967 (Act 235) the Government via the Ministry of Finance imposed anti-dumping duties at the rate of 4.97% on REBAR products originating or exported from respondent from 22 January 2020–21 January 2025.

AT THE HIGH COURT

[21] The respondent then filed a judicial review application under O 53 r 3(1) of the Rules of Court 2012 ('the ROC 2012') to seek for a certiorari order to quash the following impugned decisions:

(a) the first appellant's (Minister of Finance) decision to impose anti-dumping duties at the rate of 4.97% on REBAR originating or exported from the applicant of the Republic of Singapore from 22 January 2020–21 January 2025 as set out in the Customs (Anti-Dumping Duties) Order 2020 following the recommendation or proposal of the third appellant arising from an anti-dumping duty investigation with regard to the imports of REBAR originating or exported from the Republic of Singapore and the Republic of Turkey; and

(b) the third appellant's decision and/or recommendation to impose antidumping duties at the rate of 4.97% on REBAR originating or exported from the respondent of the Republic of Singapore as set out in the notice of affirmative final determination and the final determination report of an anti-dumping duty investigation with regard to the imports of REBAR originating or exported from the Republic of Singapore and the Republic of Turkey both dated 21 January 2020 and 7 January 2020 respectively.

[22] The learned judge, with whom learned counsel for the respondent deferred, made the following findings:

(a) the appellants, suddenly departing from their long-established practice, had unjustifiably withheld from Natsteel the details, breakdown and computation of how the normal value and dumping margin were calculated. According to the learned judge, IA had failed to act with procedural fairness and had breached the principles of natural justice by departing, without prior public notification of the change, from its long-established practice of providing details, breakdown and computation of normal value and dumping margin to exporters subject to anti-dumping duties. There is therefore a breach of legitimate expectation;

(b) it is mandatory for the appellants to disclose the details, breakdown and computation of how the normal value and dumping margin were calculated pursuant to article 12 and 6.9 of the WTO agreement on the implementation of article VI GATT 1 ('anti-dumping agreement'), and the appellants' continuous refusal to do so amounts to a breach of the principles of natural justice;

(c) the IA's construction of normal value is incorrect and cannot be justified because the IA had accounted for an unrealistically high profit margin of 4.75% — when gross profit margins of commodity steel products such as the REBAR products are only between 3% to 4%; and

(d) the IA's finding that the imports had caused injury to the domestic industry due to price suppression.

AT THE COURT OF APPEAL

[23] Let us begin by highlighting the requirements of articles 12.2 and 6.9 of the WTO anti-dumping agreement. By article 12.2, the appellants are required to provide all relevant information on the matters of fact and law and reasons which have led to the imposition of the final measures. Article 6.9 requires the authorities, before final determination, to inform all parties of the essential facts under consideration, which form the basis for the impugned decision on whether to apply the definitive measures.

[24] Have the provisions in the two relevant articles been complied with? The learned judge answered this in the negative. However, we do not find any provision in the WTO anti-dumping agreement which makes it mandatory for the authorities to provide actual mathematical determination. A

[25] In the instant appeal, the appellants had issued the Preliminary Determination Report — Anti-Dumping Investigation dated 5 September 2019 and the notice of essential facts dated 23 December 2019. B

[26] Natsteel, through its solicitors, Messrs Skrine, requested the breakdown of the calculations of the constructed normal value from the IA. In reply, the fourth appellant, MITI, stated that in determining the dumping margin, the calculation made by the IA was based on the information provided by Natsteel. A dumping margin is the difference between the normal value of a product and its export price, expressed as a percentage of the export price. C D

[27] More importantly, learned counsel submitted that, during the IA's verification visit at Natsteel's premises in Singapore, Natsteel requested the IA for the breakdown and methodology on the constructed normal value and how IA derived Natsteel's assets below the costs of the like product represented 80.79%. A constructed value in the country of origin, is the cost of production in the country of origin, plus a reasonable amount for administrative and selling costs and margin of profits. E

[28] This was refused, which, according to Natsteel, is against article 12.2.1 of the WTO anti-dumping agreement. F

[29] Before us, the learned FC contended that the IA, via Part F of the preliminary determination report dated 5 September 2019 ('PD report') and also Part E of the notice of essential facts dated 23 December 2019 had provided sufficient explanation on how the IA arrived at a finding that 80.79% of the volume of sales of the like product in the domestic market was made below cost throughout the period of investigation ('POI'). G

[30] In our view, it is not accurate to suggest, as the learned judge did, that the IA had merely provided the dumping margin. We note in Part D of the PD report and Part E of the notice of essential facts that the IA had explained how it arrived at a finding that 80.79% of the volume of sales of the like product in the domestic market was made below-cost throughout the POI. Moreover, the IA had explained the methodology used in determining normal value. It had also explained the data that had been selected for the purposes of determining the percentage of sales below the cost of the like product in the domestic market throughout the POI, whereby the IA had selected sales to all domestic customers based on the same product codes sold to Malaysia during the POI. H I

[31] We also take cognisance that both the PD report and notice of essential facts explained that:

(a) the normal value had been constructed pursuant to s 16(2) of the Countervailing and Anti-Dumping Duties Act 1993 ('the Anti-Dumping Act') and reg 26 of the Countervailing and Anti-Dumping Regulations 1994 and article 2.2. of the WTO anti-dumping agreement;

(b) the normal value had been constructed by the IA by referring to the cost of production plus a reasonable amount for sales, general and administrative expenses ('SG&A') and profit margin; and

(c) in the instant case, in arriving at the constructed normal value of SGD816.49, the IA had taken the cost of production plus a reasonable amount for SG&A and profit margin as stated in the respondent's foreign exporter's questionnaire.

[32] The IA had referred to the cost of production and the reasonable amount for SG&A and the profit margin. In our view, the learned judge had erred in concluding that the IA had taken into consideration a profit margin of 4.75% in constructing the normal value. On the contrary, the IA had applied the profit margin as supplied by the respondent in the respondent's foreign exporter's questionnaire, whereby the margin profit that the respondent had set during the period of investigation is at the rate of 4%.

[33] Was the respondent denied the right to be heard by the IA before it arrived at its final determination? We do not think so. We take note that before the final determination was made, the respondent had been given the opportunity to be heard as required under the Anti-Dumping Act through various means. They are as follows:

(a) foreign exporter's questionnaire, upon a petition being presented by Malaysia Steel Association; and

(b) the respondent was also invited to comment on the PD report and the notice of essential facts before the IA prepared the final determination report.

[34] Having appraised these facts, we do not think that there was a breach of natural justice on the part of the IA and the respondents.

[35] Before us, learned counsel for the respondent submitted that the appellants had departed from their long-established practice in unjustifiably withholding the details, breakdown and computation of how normal value was constructed and their calculation of the dumping margin. There was therefore a breach of legitimate expectation.

[36] This argument on breach of legitimate expectation was not raised by the respondent in the statement made under O 53 r 3(2) of the ROC 2012. At best, it was raised in para 33 by the affidavit-in-support affirmed by Mr Lim Siew Har. Mr Lim alluded to the fact that the previous practice of IA was to provide detailed calculations regarding galvanised iron coils/sheet or galvanised steel coils/sheets originating or exported from the People's Republic of China and the Socialist Republic of Viet Nam. There was, however, no mention of a breach of legitimate expectation in the affidavit in support.

[37] There are two things to be noted here. First, the previous practice of IA has no force of law.

[38] Secondly, even if the breach of legitimate expectation is clearly pleaded in the statement and positively asserted in the affidavit in support of Mr Lim, for it to arise, there must be evidence of a promise or undertaking made by the appellants to that effect; see *Zakiah bte Ishak v Majlis Daerah Hulu Selangor Darul Ehsan* [2005] 6 MLJ 517 (CA).

[39] We are of the view that the past practices of the IA on other unrelated notice of affirmative preliminary determination, notice of essential facts and final determination, if at all, can hardly be construed as a specific undertaking made by the IA to the respondent on the issue of REBAR. They are unrelated.

[40] As to the findings of injury and causal link by the learned judge, again, this was not one of the grounds raised in the statement made under O 53 r 3(2) of the ROC 2012. The law can be found in the judgment of the Court of Appeal in *Lembaga Tatatertib Kumpulan Sokongan (No 1) Jabatan Perlindungan Hidupan Liar dan Taman Negara & Ors v Mariani bt Ramli* [2021] 5 MLJ 857 (CA). It was held that the learned judge had committed an error of law when he decided on issues not pleaded in the grounds of the application as reflected in the statement under O 53 r 3(2) of the ROC 2012.

CONCLUSION

[41] For the aforesaid reasons, we would therefore make the following findings:

(a) the so-called long-established practice of the IA has no force of law that binds the appellants in any way. In the circumstances, the alleged failure to provide the details, breakdown, and computation of how the normal value and dumping margin were calculated, if at all, should not be legitimate grounds for judicial review. In the same breath, there is therefore no breach of legitimate expectation;

(b) the IA had sufficiently explained the methodology used in determining

normal value. The data that had been selected for the purposes of determining the percentage of sales below the cost of the like product in the domestic market throughout the POI had also been sufficiently disclosed. Before the final determination was made, the respondent had been given the opportunity to be heard. There was, therefore, no breach of the principles of natural justice;

(c) the IA's construction of normal value is correct and justifiable because the IA had applied the profit margin as supplied by the respondent in the respondent's foreign exporter's questionnaire response. The profit that had been set by the respondent during the period of investigation was at the rate of 4%; and

(d) the learned judge had erred in considering the issue that the imports had caused injury to the domestic industry due to price suppression when it was not pleaded in the statement made under O 53 r 3(2) of the ROC 2012.

[42] The learned judge failed to consider the relevant case laws on the subject and to analyse the issues before him prior to arriving at his conclusion in allowing the respondent's application for judicial review. For all the foregoing reasons we find there are merits in the appeal which compelled us to exercise our appellate intervention.

[43] The appeal is allowed and the order of the High Court is set aside with costs of RM15,000.

Appeal allowed and High Court's decision set aside.

Reported by Ashok Kumar